

WHEN A SECOND CHANCE GETS A SECOND CHANCE: REASONABLENESS REVIEW REIGNS FOR MOTIONS UNDER SECTION 404(B) OF THE FIRST STEP ACT ON APPEAL

PATRICK W. RILEY*

The First Step Act of 2018 was an historic criminal justice reform bill that, among its many provisions, retroactively reduced the disparity in sentencing for offenses involving crack and powder cocaine. Before 2010, federal law mandated the same minimum criminal penalties for conduct involving an amount of crack cocaine one hundred times smaller than an amount of powder cocaine. In 2010, Congress passed the Fair Sentencing Act, which reduced this disparity from 100:1 to 18:1. However, the updated penalties only applied to sentences imposed after the passage of the Fair Sentencing Act. Those already sentenced under the 100:1 ratio were left without any recourse until the First Step Act was passed in 2018.

Section 404(b) of the First Step Act applied the changes made by the Fair Sentencing Act retroactively to defendants imprisoned for crack cocaine offenses before the Fair Sentencing Act was passed in 2010. Since the First Step Act was passed, federal courts have diverged in how they interpret their roles and responsibilities under section 404(b). One group of circuit courts interprets section 404(b) to provide limited discretion to the district court and, therefore, the appellate court need only review the district court's decision under a

* Junior Staffer, *American University Law Review*, Volume 71; J.D. Candidate, May 2023, *American University Washington College of Law*, B.A., Political Science and Economics, 2016, *The Ohio State University*. Thank you to everyone who provided helpful feedback on this piece—from my Comment editor, Ben Reyes, to my final editor, Bethany Callahan, and everyone in between, including Steve Fisher, Sarah Shor, Anna Drew, Ethan Falk, Annemarie Gregoire, Luke Hancox, Margaret Helein, Jonathan Hoadley, Alexis Hughes, Ariel Rawls, Matthew Sokol, Adriana Morquecho, and Professor Jenny Roberts.

deferential abuse-of-discretion standard. The second group interprets section 404(b) to provide district courts with broad discretion to resentence defendants in a manner similar to an initial plenary sentencing, which appellate courts are required to review for reasonableness.

This Comment reaches the same result as the second group for two reasons: (1) This Comment applies the sentencing modification in 18 U.S.C. § 3582(c)(1)(B), rather than § 3582(c)(2), to section 404(b) of the First Step Act; and (2) this Comment interprets the text and purpose of section 404(b) as a sweeping remedy granting district courts broad discretion—like initial plenary sentencings—that must be reviewed for reasonableness.

TABLE OF CONTENTS

Introduction	1184
I. Background.....	1189
A. Appellate Standards of Review	1189
1. Overview of appellate review in the criminal sentencing context.....	1192
2. The initial plenary sentencing and reasonableness review	1194
3. The sentencing modification and abuse-of-discretion review.....	1198
B. The Purpose and Language of the First Step Act of 2018.....	1201
C. The Circuit Split.....	1206
II. Analysis.....	1212
A. Section 404(b) and § 3582(c)	1214
B. The Legislative Intent of the First Step Act and Its Implications for Judicial Review.....	1217
Conclusion.....	1220

INTRODUCTION

In April 2010, Chuck Collington was sentenced to thirty years in prison after pleading guilty to possession with intent to distribute five or more grams of crack cocaine, which was prohibited by 21 U.S.C. § 841.¹ At that time, the mandatory minimum sentence for

1. United States v. Collington, 995 F.3d 347, 350–51 (4th Cir. 2021); *see also* 21 U.S.C. § 841(a), (b)(1)(B)(iii) (2006) (establishing criminal penalties for unlawful acts involving crack cocaine).

Collington’s violation of the statute was five years, and the maximum sentence was forty years.² Less than four months later, Congress passed the Fair Sentencing Act of 2010,³ which reduced the statutory maximum for violations of § 841 like Collington’s to twenty years.⁴ Congress passed the Fair Sentencing Act to reduce sentencing disparities between cocaine and crack cocaine offenses.⁵

Unfortunately for Collington, the Fair Sentencing Act did not apply to him because he had already been sentenced.⁶ Generally, changes to the laws prescribing criminal sentences do not apply to sentences that have already been imposed, unless the new statutory language expressly applies the changes retroactively.⁷ The Fair Sentencing Act did not contain any such provisions allowing courts to retroactively apply the changes to the criminal penalties in § 841, which meant that only defendants sentenced *after* the law’s enactment could enjoy the benefits of the sentencing disparity reduction.⁸

However, over eight years after Collington’s sentence was imposed, Congress provided an opportunity for resentencing to him and thousands of others imprisoned before the enactment of the Fair Sentencing Act.⁹ A few days before Christmas in 2018, the First Step Act was signed into law.¹⁰ Among other things, this landmark criminal justice reform legislation finally applied the adjustments made in the

2. § 841(b)(1)(B) (2006).

3. Pub. L. No. 111-220, 124 Stat. 2372.

4. *See id.* § 2(a)(2), 124 Stat. at 2372 (codified at 21 U.S.C. § 841(b)(1)(B)(iii)) (increasing the minimum amount for criminal penalties under § 841(b)(1)(B)(iii) to 28 grams from five grams); § 841(b)(1)(C) (setting maximum penalty of twenty years for acts involving amounts of crack cocaine less than that listed in § 841(b)(1)(B)(iii)).

5. *See* § 2, 124 Stat. at 2372 (“Cocaine Sentencing Disparity Reduction”).

6. *Collington*, 995 F.3d at 351–52.

7. *See* 1 U.S.C. § 109 (requiring that, unless the repeal of a statute contains explicit language canceling existing criminal penalties, “such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution”).

8. § 2, 124 Stat. at 2372 (providing no express language of retroactive application).

9. *Collington*, 995 F.3d at 352; *see also* 164 CONG. REC. S7,021 (daily ed. Nov. 15, 2018) (statement of Sen. Dick Durbin) (“[The First Step Act] give[s] a chance to thousands of people who are still serving sentences for nonviolent offenses involving crack cocaine under the old 100-to-1 ruling to petition . . . the court for a reduction in the sentencing.”).

10. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (enacted December 21, 2018).

Fair Sentencing Act retroactively.¹¹ Specifically, section 404 of the First Step Act applied the “cocaine sentencing disparity reduction” in section 2 of the Fair Sentencing Act to offenses committed before August 3, 2010, the date when the Fair Sentencing Act was signed into law.¹²

Collington moved for resentencing under section 404(b) of the First Step Act.¹³ Although Collington’s thirty-year sentence exceeded the Fair Sentencing Act’s updated twenty-year statutory maximum for his conduct, which should have applied retroactively under section 404(b) of the First Step Act, the district court judge denied the motion.¹⁴ Collington subsequently appealed.¹⁵

Collington’s appeal raised an undecided issue in the Fourth Circuit: how motions for resentencing under section 404(b) of the First Step Act must be reviewed by appellate courts.¹⁶ Generally, the standard of review for appeals of federal criminal sentences is reasonableness, which requires appellate courts to review the district courts’ initially imposed criminal sentences for procedural and substantive reasonableness.¹⁷ Sentencing *modifications* can be reviewed differently—notably, with more deference—depending on which type of modification under 18 U.S.C. § 3582(c) applies.¹⁸ Once imposed, federal criminal sentences are final and may be modified only under a limited set of circumstances provided by 18 U.S.C. § 3582(c).¹⁹ Circuit courts are split on how they interpret the interplay between section 404(b) of the First Step Act and § 3582(c).²⁰ Since the First Step Act does not specify which sentencing modification under § 3582(c)

11. *Id.* § 404(b), 132 Stat. at 5222 (codified at 21 U.S.C. § 841) (“Defendants Previously Sentenced”).

12. *Id.* (“A court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.”); *see also id.* § 2, 124 Stat. at 2372 (“Cocaine Sentencing Disparity Reduction”).

13. *Collington*, 995 F.3d at 352.

14. *Id.*

15. *Id.*

16. *Id.* at 353, 353 n.2.

17. *See United States v. Booker*, 543 U.S. 220, 261–62 (2005) (Breyer, J., delivering the opinion of the Court in part) (establishing reasonableness review standard for appeals of criminal sentences); *see also infra* Section I.A.1 (explaining the history of appellate review of criminal sentences).

18. *See infra* Section I.A.3.

19. *See* 18 U.S.C. § 3582(b)–(c).

20. *See infra* Section I.C.

applies to section 404(b), the courts diverge by applying either § 3582(c)(1)(B) or § 3582(c)(2).²¹ For modifications under § 3582(c)(1)(B), courts may modify a sentence “to the extent otherwise expressly permitted by statute[;]”²² however, for sentencing modifications under § 3582(c)(2), courts may only “*reduce* the term of imprisonment” if the U.S. Sentencing Commission has since lowered the sentencing range.²³ The standard of appellate review depends on which subsection of § 3582(c) applies.²⁴ The U.S. Supreme Court has held that sentencing modifications under § 3582(c)(2) are more mechanical and limited in scope,²⁵ requiring a more deferential abuse-of-discretion standard of review on appeal.²⁶ However, a sentencing modification under § 3582(c)(1)(B) requires the district court to analyze the statute authorizing the modification, which may afford the district court more discretion, similar to that of an initial plenary sentencing.²⁷ Therefore, when a district court’s decision on a § 3582(c)(1)(B) motion is appealed, the appellate court may apply the same standard of review—reasonableness—used for an appeal of an initial plenary sentencing.²⁸

In *Collington*, the Fourth Circuit joined the Sixth and D.C. Circuits in concluding that appellate courts must review decisions on motions for resentencing under section 404(b) of the First Step Act for procedural and substantive reasonableness.²⁹ The Fourth Circuit

21. See *infra* Section I.C. See generally First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (providing no express reference to § 3582).

22. § 3582(c)(1)(B).

23. § 3582(c)(2).

24. See *infra* Sections I.A.3, I.C.

25. *Dillon v. United States*, 560 U.S. 817, 831 (2010).

26. See, e.g., *United States v. Batiste*, 980 F.3d 466, 480 (5th Cir. 2020) (applying § 3582(c)(2) to section 404(b) of the First Step Act and requiring appellate courts to review for an abuse of discretion).

27. See, e.g., *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021) (applying § 3582(c)(1)(B) to section 404(b)). An initial plenary sentencing, also known as a sentencing hearing or a presentence hearing, refers to the “proceeding at which a judge or jury receives and examines *all* relevant information regarding a convicted criminal and the related offense before passing sentence.” *Presentence Hearing*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added). At the initial plenary sentencing, the court conducts “[a] full hearing or trial on the merits, as opposed to a summary proceeding.” *Plenary Action*, *id.*

28. See, e.g., *Collington*, 995 F.3d at 360.

29. *Id.* at 359–60 (“We conclude that the holdings of the Sixth and D.C. Circuits are more convincing and in-line with our own understanding of section 404.”); see also

refused to follow other circuits that apply a more deferential abuse-of-discretion standard.³⁰ The circuits on each side of the split reach different conclusions for the appropriate standard of review for two primary reasons: (1) they diverge on which sentencing modification category—§ 3582(c)(1)(B) or § 3582(c)(2)—applies to section 404(b) of the First Step Act and (2) they differ in their interpretations of Congress’s intent in passing the First Step Act.³¹

This Comment agrees with the standard of review applied by the Fourth, Sixth, and D.C. Circuits, which concluded that appeals courts must review motions for resentencing under section 404(b) of the First Step Act for reasonableness, rather than a more deferential abuse-of-discretion standard. This Comment argues that § 3582(c)(1)(B), rather than the limited scope permitted by § 3582(c)(2), applies to section 404(b), because the text and legislative intent of the First Step Act require procedural and substantive reasonableness similar to that of an initial plenary sentencing.³² Furthermore, reasonableness review better comports with Congress’s legislative intent to provide a sweeping remedy to those defendants who received disparate sentences for crimes involving crack cocaine under 21 U.S.C. § 841.³³ Part I will provide background on appellate standards of review

Bernie Pazanowski, *Thirty-Year Drug Sentence Must Be Reduced Under First Step Act*, BLOOMBERG L. NEWS (Apr. 27, 2021, 12:05 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/true/X52G364O000000>.

30. *United States v. Concepcion*, 991 F.3d 279, 292 (1st Cir. 2021), *cert. granted*, No. 20-1650, 2021 WL 4464217 (U.S. Sept. 30, 2021); *United States v. Moore*, 975 F.3d 84, 92 (2d Cir. 2020); *United States v. Batiste*, 980 F.3d 466, 480 (5th Cir. 2020); *United States v. Kelley*, 962 F.3d 470, 479 (9th Cir. 2020); *United States v. Mannie*, 971 F.3d 1145, 1155 (10th Cir. 2020). In *Concepcion*, the U.S. Supreme Court has not granted review of the issue discussed in this Comment—the standard of review for resentencing motions under section 404(b). *See* Brief for Petitioner at I, *United States v. Concepcion*, No. 20-1650 (S. Ct. Nov. 15, 2021), 2021 WL 5359775. Rather, the Court will resolve a separate circuit split on but one aspect of the district courts’ authority under section 404(b)—whether a district court “must or may consider intervening legal and factual developments” since the initially imposed sentence when deciding on a motion under section 404(b). *Id.* Even if the Court decides to prohibit or merely permit (rather than require) this aspect of the district courts’ authority, the district courts would retain significant discretion to resentence defendants, and the circuit courts must continue to review for reasonableness. *See infra* Section II. Notably, the Sixth Circuit does not require the consideration of intervening facts and law, yet still reviews the district court’s decisions on 404(b) motions for reasonableness. *See, e.g.*, *United States v. Foreman*, 958 F.3d 506, 510–14 (6th Cir. 2020).

31. *See infra* Section I.C.

32. *See infra* Section II.A.

33. *See infra* Section II.B.

generally and in the criminal sentencing context, explain the text and legislative purpose of section 404(b) of the First Step Act, and detail the circuit split on the standard of review for motions for resentencings under section 404(b). Part II will argue that the sentencing modification statute that applies to motions for resentencings under section 404(b) of the First Step Act is § 3582(c)(1)(B) and that the text and purpose of section 404(b) require appellate courts to review motions under that section for reasonableness. The Conclusion summarizes these points and encourages the circuits to conform to the standard held by the Fourth, Sixth, and D.C. Circuits.

I. BACKGROUND

This Part will provide background on the standards of review on appeal, first by defining standards generally,³⁴ then by focusing on the standards used to review appeals of criminal sentences.³⁵ Next, it will define the reasonableness standard used by appellate courts to review initial sentences imposed by the district courts.³⁶ It will then explore the circumstances in which district courts can modify sentences once they have been imposed and how the circuit courts review those decisions.³⁷

Then, this Part will discuss how the First Step Act changed the criminal penalties for crack cocaine offenses and why Congress made those changes.³⁸ Finally, it will outline the circuit split regarding the standard of review for motions under section 404(b) of the First Step Act, introducing the relevant cases in the circuits that have ruled on this issue and explaining the core aspects of their holdings.³⁹

A. *Appellate Standards of Review*

Standards of review matter.⁴⁰ The merits of an issue on appeal are framed by the standard used by an appellate court to review a

34. *See infra* Section I.A.

35. *See infra* Section I.A.1.

36. *See infra* Section I.A.2.

37. *See infra* Section I.A.3.

38. *See infra* Section I.B.

39. *See infra* Section I.C.

40. *See* I STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.01 (4th ed. 2021) (“[S]tandards of review—those yardstick phrases meant to guide the appellate court in approaching both the issues before it and the trial court’s earlier procedure or result—actually matter.”).

decision.⁴¹ The standard defines the degree of deference to the lower court, establishes a relationship between the courts, describes the materials that may be considered on appeal, and prescribes the level of scrutiny applied by the appellate court.⁴²

The evolution of federal appellate procedure increased the importance of the process that circuit courts use to determine the appropriate standard of review.⁴³ Under Rule 28 of the Federal Rules of Appellate Procedure, appellants must address the standard of review in their opening briefs.⁴⁴ Likewise, appellees must also address the standard of review if they disagree with the standard put forth by the appellants.⁴⁵

Standards of review exist in criminal, civil, and administrative cases.⁴⁶ Standards are defined by the identity of the decision maker (i.e., the judge or the jury) and the role of that entity (i.e., fact finder or law giver).⁴⁷ Although not dispositive, the framing provided by the standard of review significantly impacts how the issue will be decided.⁴⁸ Advocates and courts must adjust how they address the merits of a case depending on what type of standard of review the court applies.⁴⁹ For decisions made by judges in criminal cases, the standards of review range from a “de novo” standard in which the district court “theoretically gets no deference” to an “abuse of discretion” standard in which the decisions made by district courts involving procedure or mixed questions of law and fact “are subject to limited review.”⁵⁰ As noted by a former Fifth Circuit Judge, the standard of review applied to a case “indicate[s] the decibel level at which the appellate advocate

41. *Id.*

42. *Id.*

43. *See id.* § 1.02 (tracking the evolution of the extent that standards of review were discussed). The circuits evolved, from individually advising that standards be discussed to recommending or requiring such discussion in the 1980s, *id.*, culminating with the 1993 amendment to Rule 28(a) of the Federal Rules of Appellate Procedure, FED. R. APP. P. 28(a)(8)(B) (requiring discussion of standards of review in all briefs in all circuits).

44. FED. R. APP. P. 28(a)(8)(B).

45. *Id.* 28(b)(4).

46. *See generally* 1–2 CHILDRESS & DAVIS, *supra* note 40, at pts. II–IV (providing an overview of the standards of review for appeals in each context).

47. *See 2 id.* § 7.01 (providing an overview of four basic standards of review in criminal appeals).

48. *See 1 id.* § 1.02 (observing that “standards of review appear to have real value” to guide the process, to favor one side, and to direct the court).

49. *Id.*

50. *2 id.* § 7.01.

must play to catch the judicial ear.”⁵¹ For example, when reviewing a case under the “abuse of discretion” standard, an appellate judge’s hearing is muted, requiring a particularly loud problem to reverse a lower court’s decision.⁵² Under the “de novo” standard, the judge’s hearing is more acute, permitting the judge to drop the needle on the full record and listen closer to the nuances.⁵³ To be effective, counsel must have a strong understanding of the standard of review for each issue and how it applies to the merits.⁵⁴

Appellate courts often use the “abuse of discretion” standard, but the standard lacks a precise definition.⁵⁵ As a result, courts apply the standard inconsistently, resulting in “a family of review standards rather than a single standard, and a family whose members differ greatly in the actual stringency of review.”⁵⁶ One of the standards in the abuse-of-discretion family is reasonableness, which is used to review criminal sentences.⁵⁷

This Section will provide a historical overview of how courts have treated criminal sentences on appeal,⁵⁸ then it will explain the requirements of the reasonableness standard used to review sentencing decisions today.⁵⁹ Finally, this Section will examine the statutes permitting district courts to modify criminal sentences after they are imposed and the steps that district and circuit courts follow when considering motions under those statutes.⁶⁰

51. Alvin B. Rubin, Symposium, *Maritime Personal Injury: The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983).

52. See 2 CHILDRESS & DAVIS, *supra* note 40, § 7.01.

53. See *id.*

54. See 1 *id.* § 1.02; see also John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 811 (1976) (“Unless counsel is familiar with the standard of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect.”).

55. Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIA. L. REV. 947, 949 (2010).

56. *Id.* at 949–50 (quoting *American Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986)).

57. See Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 13 (2008) (“[R]easonableness is one species of abuse of discretion review.”); *infra* Section I.A.1.

58. See *infra* Section I.A.1.

59. See *infra* Section I.A.2.

60. See *infra* Section I.A.3.

1. *Overview of appellate review in the criminal sentencing context*

In the criminal sentencing context, appellate courts review initial sentences for reasonableness, which is a more probative “species” of the abuse-of-discretion standard.⁶¹ Although the U.S. Supreme Court has settled on the reasonableness standard for initial plenary sentencing decisions,⁶² the level of deference that appellate courts afford to district courts’ criminal sentencing determinations has considerably shifted several times over the past forty years.⁶³

Before 1984, district court judges were basically unchecked in sentencing defendants, bound only by statutory maximums and minimums with limited appellate review.⁶⁴ Such broad discretion led to inconsistent decisions across the country,⁶⁵ so Congress established the United States Sentencing Commission to create Sentencing Guidelines (Guidelines).⁶⁶ Pursuant to the Sentencing Reform Act of 1984,⁶⁷ sentencing judges apply the Guidelines to determine the seriousness of the offense and the criminal history category of the defendant, which they use to calculate the defendant’s “Guidelines

61. Hessick & Hessick, *supra* note 57, at 13.

62. *See* United States v. Booker, 543 U.S. 220, 261 (2005). What “reasonableness review” actually requires, however, remains somewhat opaque. The contours of the standard are discussed in Section I.A.2, but this Comment takes no position on which particular components should be part of the standard.

63. *See generally* Note, *More than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 951–58 (2014) (providing background on appellate review of criminal sentences since the 1980s).

64. *See id.* at 952 (explaining that “sentencing appeals were allowed only under narrow circumstances” and “unreviewable” in practice). Of course, district court judges were bound by the principles of proportionality grounded in the Eighth Amendment to the U.S. Constitution, but this constitutional limit has proven to be a weak check on sentencing discretion outside the context of juvenile life without parole. *See* U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); *Roper v. Simmons*, 543 U.S. 551, 560–61, 569, 571 (2005) (holding that “cruel and unusual” is determined by whether punishment comports with the “evolving standards of decency” that, in modern times, distinguishes between juveniles and adults).

65. *See* Note, *supra* note 63, at 953 (opining that “sentencing judges’ unbridled discretion” at that time made the “stark lack of uniformity . . . hardly surprising”).

66. *See* 28 U.S.C. § 991(a), (b)(1) (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall . . . establish sentencing policies and practices for the Federal criminal justice system . . .”).

67. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987, 2017–26 (codified at 28 U.S.C. §§ 991–98).

range of sentence.”⁶⁸ When the Guidelines were first implemented in the late 1980s, district court judges were required to sentence defendants within the Guidelines range, except in limited circumstances.⁶⁹

During the period of mandatory Guidelines sentences, the breadth of the district courts’ discretion was limited to the Guidelines range, and appellate courts merely “check[ed] the math” of the district courts’ calculations.⁷⁰ However, the Sentencing Reform Act empowered appellate courts to review *departures* from the Guidelines under a more probing reasonableness standard.⁷¹

In 2005, the balance between trial and appellate court discretion shifted once again when the U.S. Supreme Court ruled that *mandatory* Guidelines sentences were unconstitutional under the Sixth Amendment.⁷² The Court’s ruling rendered the Guidelines *advisory* to district courts.⁷³ In doing so, the Court required appellate courts to review for reasonableness in *all* appeals of initially imposed criminal sentences, not just sentences that departed from the Guidelines.⁷⁴ Section I.A.2 examines the jurisprudence concerning appellate review of criminal sentences since 2005 and describes the components of reasonableness review.⁷⁵ Section I.A.3 outlines the different sentencing modification statutes and how the U.S. Supreme Court and circuit courts have interpreted the roles of the district and appellate courts.⁷⁶

68. 2 CHILDRESS & DAVIS, *supra* note 40, § 11.34. The “Guidelines range” is a range of months of imprisonment based on the offense level and the criminal history category. See U.S. SENT’G COMM’N, GUIDELINES MANUAL 2021, at 407 (2021), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf> [<https://perma.cc/7QZR-8CB3>] (providing Sentencing Table used to determine the Guidelines range).

69. See Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIA. L. REV. 1115, 1121–22 (2008) (explaining that departures were permitted only when the district court, upon review of the Sentencing Commission’s Guidelines, policy statements, and official commentary, determined that an aggravating or mitigating circumstance was “not adequately taken into consideration by the Sentencing Commission”).

70. Cravens, *supra* note 55, at 961.

71. See Harrison, *supra* note 69, at 1122 (“[A]ppellate courts . . . reviewed the direction and degree of the district court’s departure for reasonableness.”).

72. *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (Stevens, J., delivering the opinion of the Court in part).

73. *Id.*

74. *Id.* at 261–62.

75. See *infra* Section I.A.2.

76. See *infra* Section I.A.3.

2. *The initial plenary sentencing and reasonableness review*

In *United States v. Booker*,⁷⁷ the U.S. Supreme Court established reasonableness as the standard by which appellate courts must review all initial plenary criminal sentencing decisions.⁷⁸ The path to this standard began when the Court invalidated two provisions of the Sentencing Reform Act as unconstitutional:⁷⁹ 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory,⁸⁰ and 18 U.S.C. § 3742(e), which provided the standard of review for departures from the Guidelines on appeal.⁸¹ The latter was invalidated because it made reference to the former, which was the heart of the matter as it related to the constitutional question in the case.⁸² Nevertheless, eliminating the appellate provision opened the door for the Court to institute a new, more robust standard of review for appellate courts.⁸³

The Court recognized that its decision to render the Guidelines advisory frustrated Congress's legislative intent to provide consistency in federal sentencing through the Guidelines.⁸⁴ Therefore, to encourage uniformity in sentencing across the federal judiciary, the Court extended the application of the reasonableness standard to encompass review of all initial plenary sentencing decisions on appeal.⁸⁵ The Court bolstered the standard of review for appellate

77. 543 U.S. 220 (2005).

78. *Id.* at 261–62.

79. *Id.* at 260; *see also* Hessick & Hessick, *supra* note 57, at 7–8.

80. *See* 18 U.S.C. § 3553(b)(1) (Supp. IV 2000) (requiring that “the [district] court [] impose a sentence of the kind, and within the range” of the Guidelines, except in limited circumstances).

81. *See* § 3742(e)(3)(B)(ii) (Supp. IV 2000) (requiring that the appellate court “shall determine whether the sentence is outside the applicable guideline range, and the sentence departs from the applicable guideline range based on a factor that is not authorized under section 3553(b)”).

82. *See* Hessick & Hessick, *supra* note 57, at 8 (“Although the availability of appellate review did not itself violate the Sixth Amendment, the Court explained that it was necessary to excise the provision because it ‘contain[ed] critical cross-references to the (now-excised) § 3553(b)(1).’” (alteration in original) (quoting *Booker*, 543 U.S. at 260)).

83. *See id.* at 8–9 (observing that “the Court did not abrogate appellate review of sentencing” but actually “*expanded*” it with the “creation of the reasonableness standard”).

84. *See Booker*, 543 U.S. at 265 (“We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system.”).

85. *Id.* at 263.

courts “to iron out sentencing differences” in light of the holding that mandating Guidelines sentences was unconstitutional.⁸⁶

Specifically, the Court required “appellate courts to determine whether the sentence ‘is *unreasonable*’ with regard to” 18 U.S.C. § 3553(a),⁸⁷ which lists factors that the district court should consider when imposing a sentence.⁸⁸ Therefore, the Guidelines became but one of several factors that district courts must consider when imposing a sentence on a defendant.⁸⁹ In *Booker*, the Court provided little guidance on the precise requirements for reasonableness review, perhaps because the standard had been used in other contexts related to criminal sentencing before the ruling.⁹⁰ Subsequent cases attempted

86. *Id.* at 263–64.

87. *Id.* at 261 (emphasis added).

88. *See* 18 U.S.C. § 3553(a). The factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the [G]uidelines—
 - (i) issued by the Sentencing Commission . . .
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

Id.

89. *See Booker*, 543 U.S. at 264 (citing 18 U.S.C. § 3553(a)(4)) (holding that “[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing”).

90. *See id.* at 262 (holding that reasonableness review is not impractical because the standard was already used to review sentences that departed from the Guidelines range and sentences with no applicable Guideline, amounting to 16.7% of sentencing appeals at the time).

to color in the reasonableness standard of review,⁹¹ but the standard remains unclear.⁹²

In its current state, reasonableness review requires the appellate court to review the district court's sentencing decision for both *procedural* and *substantive* reasonableness.⁹³ For the imposition of a sentence to be *procedurally* reasonable, the district court judge must consider the factors in § 3553(a), properly calculate the Guidelines range, treat the Guidelines as advisory (rather than mandatory), consider the presentence report, base the sentence on true facts, and adequately explain the reasons for imposing the sentence.⁹⁴

Substantive reasonableness of a sentence, on the other hand, has evaded a straightforward definition.⁹⁵ In theory, substantive reasonableness review “provide[s] a backstop for those few cases that, although procedurally correct,” are otherwise unjust.⁹⁶ In practice, the U.S. Supreme Court held in *Rita v. United States*⁹⁷ that appellate courts may presume that sentences are reasonable when imposed within a properly calculated Guidelines range.⁹⁸ However, as the Court explained in *Gall v. United States*,⁹⁹ the inverse of that rule—the presumption of unreasonableness when outside the Guidelines

91. See, e.g., *Gall v. United States*, 552 U.S. 38, 51 (2007) (holding that appellate courts may not presume that sentences are unreasonable when imposed outside of the Guidelines range); *Rita v. United States*, 551 U.S. 338, 347 (2007) (holding that appellate courts may presume that sentences are reasonable when imposed within a properly calculated Guidelines range).

92. See Cravens, *supra* note 55, at 963 (noting that subsequent cases “were noteworthy steps forward in the practical understanding of the bounds on discretion for both district and appellate court judges, but the opinions also left a glaring hole unfilled”).

93. *Gall*, 552 U.S. at 51.

94. See *id.* (noting that an adequate explanation must include an explanation of a departure from the Guidelines range); see also Cravens, *supra* note 55, at 964–65 (recommending that appellate courts refrain from presuming that district courts provided sufficient reasoning to support the sentencing determination and “actually look[] at the considerations”).

95. See, e.g., Cravens, *supra* note 55, at 966 (“There was really no useful guidance from the Supreme Court about what [substantive reasonableness] means.”); Note, *supra* note 63, at 959–60 (“Judge Jeffrey Sutton of the Sixth Circuit . . . elaborated that he was at ‘close to a loss . . . in what [he] . . . should be doing when it comes to reviewing sentences for substantive reasonableness.’” (alteration in original)).

96. See Note, *supra* note 63, at 958 (alteration in original) (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)).

97. 551 U.S. 338 (2007).

98. *Id.* at 347.

99. 552 U.S. 38 (2007).

range—is not permitted.¹⁰⁰ The appellate court must still “give due deference to the district court” when considering the sentencing factors.¹⁰¹

To some concerned observers, substantive reasonableness review threatens to supplant the discretion of the district court judge with that of the appellate court judge.¹⁰² However, assessing the substantive reasonableness of a sentence on appeal does not amount to a plenary resentencing at the appellate level.¹⁰³ The Court pointed out in *Gall* that “[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”¹⁰⁴ In other words, substantive reasonableness review allows for a range of discretion within which the sentence may not be overturned; however, the outer bounds of that range have not been defined by the Court.¹⁰⁵

As it stands, *Booker* and subsequent cases have been unable to provide a clear and comprehensive definition of the reasonableness standard for appellate courts *or* settle the tension between district court discretion and “appellate discretion.”¹⁰⁶ Even if the precise contours of procedural and substantive reasonableness continue to develop in the future,¹⁰⁷ reasonableness review of criminal sentences is the standard and has been so since *Booker* was decided in 2005.¹⁰⁸ While *Booker* established the standard of review for appeals of initial plenary sentencing decisions, the U.S. Supreme Court has also weighed in on

100. *Id.* at 51.

101. *Id.*

102. *See* Cravens, *supra* note 55, at 966 (“If discretion is to have any robust meaning, any *integrity* of meaning, in the sentencing context, there can be no such thing as substantive unreasonableness.”).

103. *See* James L. Fant, Comment, *Is Substantive Review Reasonable? An Analysis of Federal Sentencing in Light of Rita and Gall*, 4 SETON HALL CIR. REV. 447, 469 (2008) (“[T]he yardstick of substantive reasonableness [still] represents a range of discretionary sentences.”).

104. 552 U.S. at 51.

105. *See* Cravens, *supra* note 55, at 966. Substantive reasonableness seems to place restrictions on the discretion of judges beyond the baseline restrictions established by the U.S. Constitution. *See supra* note 64.

106. *See* Hessick & Hessick, *supra* note 57, at 13 (“[Subsequent cases] proclaim that reasonableness review is no different from abuse of discretion review. But reasonableness and abuse of discretion are not, in fact, interchangeable. Rather, reasonableness is one species of abuse of discretion review.”).

107. *See* Cravens, *supra* note 55, at 964–66 (arguing for more stringent procedural reasonableness review and elimination of substantive reasonableness review).

108. 543 U.S. 220, 260–65 (2005).

how district and appellate courts must handle motions for sentencing modifications.¹⁰⁹

3. *The sentencing modification and abuse-of-discretion review*

Generally, criminal sentences imposed by a district court are final and may not be modified except under certain exceptions to finality provided by 18 U.S.C. § 3582.¹¹⁰ Under that statute, an imposed sentence may be modified in three situations: (1) when there are extraordinary and compelling reasons,¹¹¹ (2) when permitted by statute or Federal Rule of Criminal Procedure 35,¹¹² or (3) when the sentencing range has been reduced by the U.S. Sentencing Commission.¹¹³ In regards to the First Step Act, section 404(b) does not explicitly reference a particular exception to finality under § 3582(c) that permits a modification to the sentence.¹¹⁴ Therefore, courts must interpret the text and intent of the First Step Act to determine which sentencing modification—§ 3582(c)(1)(B) or § 3582(c)(2)—applies to section 404(b), and circuit courts have split when making this determination.¹¹⁵ Under § 3582(c)(1)(B), “the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.”¹¹⁶ Under § 3582(c)(2), “the court may reduce the term of imprisonment” when the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.”¹¹⁷

109. See *Dillon v. United States*, 560 U.S. 817, 831 (2010) (interpreting 18 U.S.C. § 3582(c)(2)).

110. 18 U.S.C. § 3582(b)–(c).

111. § 3582(c)(1)(A). This modification is typically referred to as “compassionate release.” See, e.g., *United States v. McCoy*, 981 F.3d 271, 275–76 (4th Cir. 2020) (“[Section] 3582(c)(1)(A)[is] known as the compassionate release statute.”) This modification used to require a motion by the federal Bureau of Prisons, but another section of the First Step Act (that is not covered by this Comment) enabled defendants to petition the court. *Id.* at 276; First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5238–39.

112. § 3582(c)(1)(B); see also FED. R. CRIM. P. 35(b) (permitting the reduction of a defendant’s sentence when the defendant provides substantial assistance to the government in the investigation or prosecution of another person).

113. § 3582(c)(2).

114. See generally First Step Act of 2018 § 404(b), 132 Stat. at 5222 (permitting the court to impose a reduced sentence on a motion under the Act without reference to § 3582(c)).

115. See *infra* Section I.C.

116. § 3582(c)(1)(B).

117. § 3582(c)(2).

The two modifications require different procedures from the district courts.¹¹⁸ For sentencing modifications under § 3582(c)(2), the district court's procedure does *not* amount to a full resentencing like the initial plenary sentencing.¹¹⁹ Rather, the district court's discretion under § 3582(c)(2) is limited to "the narrow bounds established by the Commission," which is different from the initial plenary sentencing in two significant ways.¹²⁰ First, the district court may only impose a new sentence within the updated Guidelines range.¹²¹ In *Dillon v. United States*,¹²² the U.S. Supreme Court held that *Booker*, which rendered the Guidelines advisory rather than mandatory for initial plenary sentencings, did not apply to sentencing modifications under § 3582(c)(2).¹²³ Second, the district court may consider the § 3553(a) sentencing factors only if the underlying Sentencing Commission policy lowering the Guidelines range so requires.¹²⁴

Notably, in the *Dillon* case, Percy Dillon was sentenced for a crack cocaine offense.¹²⁵ Dillon moved for sentencing relief based on the U.S. Sentencing Commission's reduction in the offense level for crack cocaine offenses that was applied retroactively, providing an exception to finality under § 3582(c)(2).¹²⁶ The district court reduced Dillon's sentence to the bottom of the amended Guidelines range, declining to go below that minimum, a decision that the Supreme Court ultimately affirmed due to the inapplicability of *Booker* to § 3582(c)(2).¹²⁷ The Supreme Court also affirmed the district court's decision not to consider any of the § 3553(a) factors, holding that the Sentencing

118. See § 3582(c)(1)(B), (c)(2); see also *infra* Section I.A.3.

119. See *Dillon v. United States*, 560 U.S. 817, 825, 831 (2010) ("[Section] 3582(c)(2) does not authorize a resentencing.").

120. *Id.* at 831.

121. *Id.* at 827–28. However, the district court may reduce a sentence below the Guidelines range if the original sentence was below the Guidelines range and the modified sentence is "comparably' below the amended range." *Id.* at 827.

122. 560 U.S. 817 (2010).

123. *Id.* at 827–28.

124. *Id.*; see also 18 U.S.C. § 3582(c)(2) ("[T]he court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) *to the extent that they are applicable*["] (emphasis added)).

125. *Dillon*, 560 U.S. at 822.

126. See *id.* at 821–23 (explaining that the Commission "sought to alleviate the disparity produced by" the 100:1 crack-to-powder ratio in its mandatory minimum sentences by reducing "the base offense level associated with each quantity of crack cocaine").

127. *Id.* at 823–24, 827–28.

Commission's policy lowering the offense level for crack cocaine offenses did not require such a consideration.¹²⁸

Due to the inapplicability of *Booker* and the limited applicability of § 3553(a) factors, "the sentenc[ing] modification proceedings authorized by § 3582(c)(2) are readily distinguishable from other sentencing proceedings," notably the initial plenary sentencing, because they provide a narrow scope of relief.¹²⁹ Therefore, because of the limited discretion afforded to the district court under § 3582(c)(2), appellate courts apply a more deferential abuse-of-discretion standard of review to sentencing modification decisions under § 3582(c)(2), rather than the more probing reasonableness standard required for initial plenary sentencing decisions.¹³⁰

For sentencing modifications made under § 3582(c)(1)(B), the Supreme Court has not decided an analogous case that sets bright-line rules as in *Dillon* because district courts must instead interpret the underlying statute that authorizes the sentencing modification to determine the scope of their discretion, which then informs the standard of review.¹³¹ In the First Step Act context, the courts that apply § 3582(c)(1)(B) to section 404(b) afford the district courts broader discretion to resentence defendants than the courts that apply *Dillon's* reading of § 3582(c)(2) to section 404(b).¹³²

The circuits are split on the required standard of review for motions under section 404(b) because they have different interpretations of which sentencing modification—§ 3582(c)(1)(B) or § 3582(c)(2)—applies to section 404(b) of the First Step Act.¹³³ Depending on the type of modification that applies, the circuits both require and allow different considerations by the district court in deciding how to rule

128. *Id.*

129. *Id.* at 830. In the context of the First Step Act, the courts that apply § 3582(c)(2) to section 404(b) permit the district court to merely apply the revised penalties under 21 U.S.C. § 841. *See, e.g.*, *United States v. Kelley*, 962 F.3d 470, 475–76 (9th Cir. 2020). The district court's discretion to determine whether to reduce the sentence is based on a change to a single variable, rather than a thorough consideration of factors required in the initial plenary sentencing. *Id.*

130. *Kelley*, 962 F.3d at 475–76; *United States v. Batiste*, 980 F.3d 466, 471 (5th Cir. 2020) (citing *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019)).

131. *See, e.g.*, *United States v. Collington*, 995 F.3d 347, 353 (4th Cir. 2021) (quoting *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020)).

132. *Id.* at 353–54.

133. *Compare id.* (holding that section 404 motions are brought under § 3582(c)(1)(B)), *with Batiste*, 980 F.3d at 472 (holding that section 404 motions are more similar to § 3582(c)(2)).

on the motion, which then informs the standard of review on appeal of that decision.¹³⁴ Courts must interpret the text and purpose of section 404(b) to determine which sentencing modification applies and the scope of relief available.¹³⁵

B. The Purpose and Language of the First Step Act of 2018

The First Step Act of 2018 was a landmark, bipartisan¹³⁶ criminal justice reform bill composed of several components.¹³⁷ One of the reforms in section 404(b) of the Act retroactively applied section 2 of the Fair Sentencing Act of 2010, which reduced the disparity between sentences for offenses involving crack cocaine and powder cocaine.¹³⁸

Before the Fair Sentencing Act was passed in 2010, the criminal penalties in 21 U.S.C. § 841 and § 960 mandated the same minimum sentence for conduct involving amounts of crack cocaine one hundred times smaller than amounts of powder cocaine.¹³⁹ For example, the statutes mandated a five-year term of imprisonment for offenses involving *five* grams of *crack* cocaine, while *five hundred* grams of *powder* cocaine would trigger the same penalty.¹⁴⁰

134. See *infra* Section I.C.

135. See *infra* Section I.B.

136. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/APG4-3GNM>] (tracking the efforts by Senators Chuck Grassley (R-Iowa) and Dick Durbin (D-Ill.) to pass criminal sentencing reform legislation).

137. Pub. L. No. 115-391, 132 Stat. 5194 (2018).

138. § 404(b), 132 Stat. at 5222; Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372.

139. Compare 21 U.S.C. § 841(b)(1)(B)(iii) (2006) (penalizing crimes involving 5 grams of crack cocaine), and *id.* § 960(b)(2)(C) (penalizing crimes involving the import or export of 5 grams of crack cocaine), with *id.* § 841(b)(1)(B)(ii) (penalizing crimes involving 500 grams of powder cocaine), and *id.* § 960(b)(2)(B) (penalizing crimes involving the import or export of 500 grams of powder cocaine). Congress more harshly penalized crack cocaine offenses because it was concerned that “crack cocaine was uniquely addictive, was associated with greater levels of violence than was powder cocaine, and was especially damaging to the unborn children of users.” *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 110th Cong. 267–68 (2008) (statement of J. Reggie B. Walton, U.S. District Court for the District of Columbia) (citations omitted). However, more than “twenty years of experience have taught us all that many of the beliefs used to justify [the crack-powder disparity] were wrong.” *Id.* at 268.

140. § 841(b)(1)(B)(ii)–(iii), 960(b)(2)(B)–(C) (2006).

Notably, the disparate sentences for the different types of cocaine also created racial inequities.¹⁴¹ As of 2018, 80% of those imprisoned for crack cocaine trafficking were Black, 13% were Hispanic, and 6.3% were White.¹⁴² In contrast, only 27.4% of those imprisoned for powder cocaine trafficking were Black.¹⁴³ Since those convicted of crack cocaine offenses were overwhelmingly Black, they also bore the brunt of the sentencing disparity that more harshly punished crack cocaine offenses.¹⁴⁴

With the Fair Sentencing Act and First Step Act, Congress sought to reform sentencing statutes that created deep disparities between sentences for crimes involving the same amounts of crack and powder cocaine.¹⁴⁵ To accomplish this goal, the Fair Sentencing Act increased the requisite amount of crack cocaine that triggered the penalties in § 841(b) and § 960(b).¹⁴⁶ The Fair Sentencing Act provided the following:

Sec. 2. Cocaine sentencing disparity reduction.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and

(2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.

(b) Import and Export Act.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

141. Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [<https://perma.cc/LZ2Z-FGN6>].

142. U.S. SENT'G COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 110 tbl.D-2 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/TableD2.pdf> [<https://perma.cc/K596-3QR7>].

143. *Id.*

144. *See* George, *supra* note 141 (“With crack’s prevalence in many [B]lack neighborhoods in the 1980s, the crack penalty hit African Americans much harder than [W]hite powder cocaine users.”).

145. 164 CONG. REC. S7,748 (daily ed. Dec. 18, 2018) (statement of Sen. Amy Klobuchar) (“[The First Step Act] includes a crucial provision to allow people who were sentenced under discriminatory drug laws, which required a longer mandatory minimum sentence for the possession of crack than for the possession of the same amount of cocaine, to petition to be resentenced under the reform guidelines we passed in 2010.”).

146. JULIE ZIBULSKY & CHRISTINE KITCHENS, U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 41 (2020).

(1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and

(2) in paragraph (2)(C), by striking “5 grams” and inserting “28 grams”.¹⁴⁷

For people like Collington, convicted for an offense involving five or more grams of crack cocaine under § 841(b), the Fair Sentencing Act’s “cocaine sentencing disparity reduction” provision increased the minimum required amount of crack cocaine to twenty-eight grams.¹⁴⁸ Similarly, the statutes mandating a ten-year minimum sentence for fifty or more grams of crack cocaine were increased to 280 grams.¹⁴⁹ These changes made by the Fair Sentencing Act reduced the mandatory sentencing disparities between crack and powder from 100:1 to roughly 18:1.¹⁵⁰

Unfortunately for those already imprisoned under the 100:1 system, the Fair Sentencing Act was only applied prospectively.¹⁵¹ As a result, the changes made by the Act to the penalties in § 841 were only applied to sentences imposed *after* the Act was passed into law, leaving individuals already sentenced to prison for crack cocaine offenses without any recourse.¹⁵² Under federal law, changes to sentencing provisions only apply prospectively by default.¹⁵³ To apply the changes retroactively, the legislation must include explicit language permitting retroactive application.¹⁵⁴ Congress did not provide any language in

147. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372.

148. *Id.* § 2(a)(2), 124 Stat. at 2372 (codified at 21 U.S.C. § 841(b)(1)(B)(iii)); *see supra* notes 1–2 and accompanying text.

149. § 2(a)(1), (b)(1), 124 Stat. at 2372 (codified at 21 U.S.C. §§ 841(b)(1)(A)(iii), 960(b)(1)(C)).

150. ZIBULSKY & KITCHENS, *supra* note 146, at 41. *Compare* 21 U.S.C. § 841(b)(1)(B)(iii) (penalizing crimes involving 28 grams of crack cocaine), and § 960(b)(2)(C) (penalizing crimes involving the import or export of 28 grams of crack cocaine), *with* § 841(b)(1)(B)(ii) (penalizing crimes involving 500 grams of powder cocaine), and § 960(b)(2)(B) (penalizing crimes involving the import or export of 500 grams of powder cocaine).

151. *See, e.g.*, United States v. Collington, 995 F.3d 347, 351–52 (4th Cir. 2021) (determining that individuals like Collington were left “without access to sentencing relief”).

152. *Id.*

153. *See* 1 U.S.C. § 109 (“The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide . . .”).

154. *Id.*

the Fair Sentencing Act that allowed for the changes to apply retroactively.¹⁵⁵

Eight years later, Congress retroactively applied the sentencing disparity reforms in the Fair Sentencing Act through the First Step Act of 2018.¹⁵⁶ Specifically, section 404 of the First Step Act provided the following:

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term “covered offense” means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.¹⁵⁷

With this provision, “Congress authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially

155. See § 2, 124 Stat. at 2372 (providing no express language of retroactive application).

156. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. For more information on the other parts of the First Step Act, see also CONG. RSCH. SERV., THE FIRST STEP ACT OF 2018: AN OVERVIEW, R45558, 1, 9–10 (2019) (providing summary of the additional sentencing reforms, such as the expansion of the safety valve and elimination of the stacking provision, as well as the correctional reforms and reauthorization of the Second Chance Act).

157. § 404, 132 Stat. at 5222.

disparate sentencing scheme.”¹⁵⁸ The retroactive application of the Fair Sentencing Act by the First Step Act afforded the opportunity for relief to over 2,600 prisoners.¹⁵⁹ Within one year after passage of the First Step Act in 2018, nearly 2,400 offenders received a reduction in their sentences.¹⁶⁰

Although the district courts’ reductions in sentences were likely the end of the road for many of the cases dealing with motions under

158. *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020); *see also* 164 CONG. REC. S7,649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley) (“The First Step Act . . . addresses overly harsh and expensive mandatory minimums for certain nonviolent offenders.”); *id.* at S7,021 (statement of Sen. Dick Durbin) (“The worst vote I ever cast in my life in the House or in the Senate was for the 100-to-1 sentencing disparity between crack cocaine and powder cocaine . . . [The First Step Act] give[s] a chance to thousands of people who are still serving sentences for nonviolent offenses involving crack cocaine under the old 100-to-1 ruling to petition individually, not as a group, to the court for a reduction in the sentencing.”). Nearly three years after the passage of the First Step Act, the 117th Congress demonstrated its appetite for even further sentencing reform with the “Eliminating a Quantifiably Unjust Application of the Law Act of 2021,” also known as the “EQUAL Act of 2021.” H.R. 1693, 117th Cong. (2021); S. 79, 117th Cong. (2021). This bill, which passed the House in a bipartisan vote of 361-66, would reduce the penalty ratio from 18:1 to 1:1, thereby entirely eliminating the sentencing disparity between crack and powder cocaine. Sarah N. Lynch, *U.S. House Passes Bill to End Disparities in Crack Cocaine Sentences*, REUTERS (Sept. 28, 2021), [reuters.com/world/us/us-house-passes-bill-end-disparities-crack-cocaine-sentences-2021-09-28](https://www.reuters.com/world/us/us-house-passes-bill-end-disparities-crack-cocaine-sentences-2021-09-28). The EQUAL Act would eliminate the disparity by repealing the clauses in § 841 and § 960 that provide a unique definition of and penalize separate, lower amounts of crack cocaine than other offenses involving cocaine. H.R. 1693, § 2(a)–(b) (repealing § 841(b)(1)(A)(iii), § 841(b)(1)(B)(iii), § 960(b)(1)(C), and § 960(b)(2)(C)); S. 79, § 2(a)–(b) (same). Like section 404(b) of the First Step Act, the text of the proposed legislation expressly provides retroactive relief to individuals already imprisoned under these offenses. *See* H.R. 1693, § 2(c)(2)(A) (permitting the sentencing court to “impose a reduced sentence” for “a defendant who, on or before the date of enactment of this Act, was sentenced” under § 841, § 960, or § 844(a)); S. 79, § 2(c)(2) (permitting the same for a defendant sentenced for any “offense involving cocaine base”). Therefore, if this legislation becomes law, the motions for resentencing currently made under section 404(b) of the First Step Act would instead be made under the lower penalties provided by section 2(c)(2) of the EQUAL Act. *Compare* § 404, 132 Stat. at 5222 (retroactively applying the Fair Sentencing Act’s modification to § 841(b)(1)(A)(iii)), *with* H.R. 1693, § 2(a)(1) (repealing § 841(b)(1)(A)(iii) and leaving § 841(b)(1)(A)(ii)—providing penalties for 5 kilograms of cocaine—as the only penalties for cocaine under § 841(b)(1)(A)). Nevertheless, due to the nearly identical language and intent of the EQUAL Act and section 404(b) of the First Step Act, the courts’ interpretations of 404(b) that are the focus of this Comment would also apply to any future analysis of the EQUAL Act.

159. U.S. SENT’G COMM’N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY (2018).

160. ZIBULSKY & KITCHENS, *supra* note 146, at 43.

section 404(b), this Comment is concerned with the instances in which the district courts' decisions were appealed. The circuits are split on the standard of review used to review these motions on appeal because they differ in their interpretations of the legislative purpose of section 404(b) and the section's interplay with the sentencing modification statutes.¹⁶¹

C. *The Circuit Split*

The Fourth, Sixth, and D.C. Circuits interpret the statutory language and legislative purpose of section 404 of the First Step Act to grant district courts broad discretion when considering resentencing motions under section 404(b)—similar in scope to an initial plenary sentencing—which requires appellate courts to review for reasonableness on appeal.¹⁶² Conversely, the First, Second, Fifth, Ninth, and Tenth Circuits interpret section 404(b) to be limited and mechanical¹⁶³—similar in scope to a sentencing modification under § 3582(c)(2)—and, therefore, apply a more deferential abuse-of-discretion standard of review on appeal.¹⁶⁴

In the most recent case contributing to the circuit split, *United States v. Collington*,¹⁶⁵ the Fourth Circuit considered a defendant's appeal of a district court's decision to deny the defendant's motion for resentencing under section 404(b) and retain a sentence that was ten years longer than the updated maximum sentence under § 841 that was retroactively applied by section 404(b).¹⁶⁶ The defendant argued

161. See *infra* Sections I.C, II.A–B.

162. See *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021); *United States v. Foreman*, 958 F.3d 506, 512 (6th Cir. 2020); *United States v. White*, 984 F.3d 76, 88 (D.C. Cir. 2020). Notably, the district courts that make up the Fourth Circuit have, by a significant margin, granted the most resentencing motions under section 404(b) (31.2% of all resentencings since the passage of the First Step Act). U.S. SENT'G COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT tbl.6 (2021).

163. See *United States v. Concepcion*, 991 F.3d 279, 287 (1st Cir. 2021), *cert. granted*, No. 20-1650, 2021 WL 4464217 (U.S. Sept. 30, 2021); *United States v. Moore*, 975 F.3d 84, 87, 89, 91 (2d Cir. 2020); *United States v. Batiste*, 980 F.3d 466, 471 (5th Cir. 2020); *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020); *United States v. Mannie*, 971 F.3d 1145, 1149, 1155, 1157 (10th Cir. 2020).

164. 18 U.S.C. § 3582(c)(2); *Dillon v. United States*, 560 U.S. 817, 831 (2010) (limiting the district courts' discretion to modify sentences when deciding motions under § 3582(c)(2)).

165. 995 F.3d 347 (4th Cir. 2021).

166. *Id.* at 352.

that: (1) the district court was required to resentence to, at most, the new maximum,¹⁶⁷ and (2) the district court did not adequately explain its decision to retain the initially imposed sentence.¹⁶⁸

To assess whether the district court erred by retaining a sentence above the new maximum, the Fourth Circuit first noted that section 404(b) motions are brought under the sentencing modification found in 18 U.S.C. § 3582(c)(1)(B), rather than § 3582(c)(2).¹⁶⁹ The court applied § 3582(c)(1)(B) to section 404(b) because § 3582(c)(1)(B) “lack[s] the restrictions imposed by *Dillon* on the scope of a district court’s resentencing authority.”¹⁷⁰ The Fourth Circuit interpreted the text of section 404(b)—permitting district courts to “impose” a sentence, rather than merely “modify” or “reduce” a sentence—to confer a “greater authority” than the limited mechanical application allowed in § 3582(c)(2).¹⁷¹ Specifically, district courts must apply additional procedural steps when considering motions for resentencing under section 404(b), including comprehensively reconsidering the § 3553(a) sentencing factors.¹⁷² While these additional steps are similar to those required in an initial plenary sentencing, the Fourth Circuit stopped short of requiring a “plenary resentencing.”¹⁷³ In addition to the procedural requirements, the court also applied substantive reasonableness to motions for resentencing under section 404(b).¹⁷⁴ Since the goal of one of the

167. *Id.*

168. *Id.* at 358. The district court denied the defendant’s motion for resentencing in a text order. *Id.* at 352.

169. *Id.* at 353 (citing *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020)).

170. *Id.* at 354. In *Dillon*, the U.S. Supreme Court interpreted the sentencing relief available under § 3582(c)(2) to “the narrow bounds established by the Commission,” limiting the district court’s discretion rather than permitting a more thorough procedure comparable to an initial plenary sentencing. 560 U.S. 817, 831 (2010).

171. *Collington*, 995 F.3d at 354 (citing *Chambers*, 956 F.3d at 672); *see also* First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (using the word “impose”).

172. *Collington*, 995 F.3d at 356. Another procedural requirement is to apply the statutory maximum, which was the basis for the Fourth Circuit to vacate the district court’s decision to deny resentencing to the defendant. *Id.* at 358.

173. *See id.* at 356, 356 n.4 (“Importantly, we have not held that section 404 guarantees defendants a plenary sentencing hearing.”); *see also* Elizabeth Williams, *Proof of Entitlement to Reduction of Sentence Under First Step Act*, 190 AM. JUR. PROOF OF FACTS 3D 407 (2021) (explaining that “[a] plenary resentencing hearing carries with it *all* of the procedural trappings and collateral effects of the original sentencing” (emphasis added)).

174. *Collington*, 995 F.3d at 360.

§ 3553(a) factors to “avoid unwarranted sentence disparities” and the purpose of the First Step Act to reduce the disparities between sentences involving crack and powder cocaine were similar in nature, “it naturally follows that a substantive reasonableness requirement would attach to First Step Act proceedings.”¹⁷⁵ Thus, the Fourth Circuit held that the appropriate standard of review for appeals of motions for resentencing under section 404(b) is procedural and substantive reasonableness, the same standard of review used for appeals of initial plenary sentencings.¹⁷⁶

Similarly, the D.C. Circuit also required reasonableness review for 404(b) motions, but went further than the Fourth Circuit by requiring an even more robust review.¹⁷⁷ In *United States v. White*,¹⁷⁸ the D.C. Circuit reviewed a resentencing decision involving an amount of crack cocaine above the retroactively applied increases to the amounts of crack cocaine triggering the penalties under 21 U.S.C. § 841.¹⁷⁹ Therefore, the minimum criminal penalties required under § 841 did not change with section 404(b)’s retroactive application of the changes to § 841 made by the Fair Sentencing Act.¹⁸⁰ Nevertheless, the court determined that the First Step Act and the Fair Sentencing Act were “strong remedial statutes” that seek to mitigate “disproportionate and racially disparate sentencing penalties.”¹⁸¹ Accordingly, the D.C. Circuit held that district courts have the discretion to “fashion the most complete relief possible” when considering motions under section 404(b).¹⁸²

Therefore, in *White*’s case, even if the updated drug quantities in § 841 would not have *required* that *White* be sentenced to a lesser sentence, the purpose of the First Step Act afforded the district court

175. *Id. Compare* 18 U.S.C. 3553(a)(6) (“The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”), *with Collington*, 995 F.3d at 354–55 (“[T]he First Step Act was motivated by a belief that individuals prior to 2010 were sentenced under an unduly harsh statutory scheme . . .”).

176. *Collington*, 995 F.3d at 360–61.

177. *See United States v. White*, 984 F.3d 76, 90–92 (D.C. Cir. 2020).

178. 984 F.3d 76 (D.C. Cir. 2020).

179. *Id.* at 84–85.

180. *Id.*

181. *Id.* at 90.

182. *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

the *discretion* to do so.¹⁸³ And, as part of the district court’s discretion, it *was required* to follow many of the procedural steps that are part of an initial plenary sentencing, such as considering the § 3553(a) sentencing factors.¹⁸⁴ Additionally, district courts were required to consider post-sentencing conduct,¹⁸⁵ which is particularly relevant in these cases due to the length of time that many of the defendants eligible for relief under section 404(b) have been in prison.¹⁸⁶ Therefore, due to the extensive discretion and required procedures of the district court, the D.C. Circuit held that reasonableness was the appropriate standard of review for appeals of motions for resentencing under section 404(b).¹⁸⁷

The final case on the reasonableness side of the split calls for a level of review that is less robust than the standards described in *Collington* and *White*.¹⁸⁸ In *United States v. Foreman*,¹⁸⁹ the Sixth Circuit reviewed a district court decision that partially granted the defendant’s motion for resentencing under section 404(b).¹⁹⁰ The district court partially granted the motion in a written order without first conducting a hearing.¹⁹¹ The Sixth Circuit rejected the defendant’s argument that the use of the word “impose” in section 404(b) required the district court to conduct a plenary resentencing.¹⁹² The court concluded that “impose” does not only describe initial plenary sentencings and, thus, the use of the word in section 404(b) did not “create a plenary resentencing requirement by implication.”¹⁹³ Nevertheless, the court

183. *See id.* at 92 (“Relief may be awarded to defendants so long as their *offenses* are covered under section 404(a)” (internal quotation marks omitted) (emphasis added)).

184. *Id.* at 90.

185. *Id.* The court reversed the district court’s order in part because it did not explicitly consider any of the other mitigation evidence, such as letters of support, or hold a hearing on the motion for relief. *Id.* at 92.

186. Because section 404(b) of the First Step Act merely made the changes that were previously made in the Fair Sentencing Act retroactive, nearly all of the defendants that were provided the opportunity for relief have been in prison for at least a decade, with the earliest sentences receiving reductions dating back to 1990. U.S. SENT’G COMM’N, *supra* note 162, at tbl.2. At the time of the D.C. Circuit’s opinion, *White* had been in prison for twenty-seven years. *White*, 984 F.3d at 91.

187. *White*, 984 F.3d at 91.

188. *See United States v. Foreman*, 958 F.3d 506, 510–14 (6th Cir. 2020).

189. 958 F.3d 506 (6th Cir. 2020).

190. *Id.* at 509.

191. *Id.*

192. *Id.* at 510–11.

193. *Id.*

also held that section 404(b) provided the district court with more discretion to resentence defendants than a sentencing modification under 18 U.S.C. § 3582(c)(2).¹⁹⁴ Although the court did not *require* specific procedures, it held that section 404(b) the First Step Act provided “open-ended discretion” that has “no additional constraints.”¹⁹⁵ The court also noted that it preferred to apply the existing procedures used in initial plenary sentencings, particularly the § 3553(a) sentencing factors, to this new context.¹⁹⁶ Likewise, the district court’s broad discretion to undergo a less-than-plenary resentencing called for an adjusted, “less exacting” reasonableness standard on appeal.¹⁹⁷ While the courts in *Collington*, *White*, and *Foreman* differ on the precise level of discretion that district courts have when considering motions for resentencing under 404(b), they all agree that district courts have sufficient discretion that requires reasonableness review on appeal.

In assessing the abuse-of-discretion side of the circuit split, the Fifth and Ninth Circuits provide the most helpful summary of the positions held by all five circuits.¹⁹⁸ In *United States v. Kelley*,¹⁹⁹ the Ninth Circuit did not make an explicit ruling on the appellate court’s standard of review, but its holding on the district court’s discretion helps frame the more deferential abuse-of-discretion standard.²⁰⁰ The court interpreted the language in section 404(b) that allows a district court to “impose a reduced sentence *as if* the Fair Sentencing Act was in effect at the time of the underlying conduct to authorize the district court to consider only a single variable—the updated criminal penalty in 21 U.S.C. § 841 or § 960—when considering a motion for resentencing under section 404(b).²⁰¹ The limiting language of section

194. *Id.* at 513.

195. *Id.*

196. *See id.* at 513–14 (citing *United States v. Allen*, 956 F.3d 355, 357–58 (6th Cir. 2020)) (“It would be anomalous . . . for Congress to have delegated this level of discretion without some guiding principles in mind.”); *see also* 18 U.S.C. § 3553(a).

197. *Foreman*, 958 F.3d at 514–15.

198. *See United States v. Kelley*, 962 F.3d 470, 475–78 (9th Cir. 2020); *United States v. Batiste*, 980 F.3d 466, 471–74, 479–80 (5th Cir. 2020).

199. 962 F.3d 470 (9th Cir. 2020).

200. *Id.* at 479.

201. *Id.* at 475–76; First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (emphasis added).

404(b), therefore, requires a limited procedure like a sentencing modification under § 3582(c)(2).²⁰²

The Ninth Circuit was troubled by the potential effects of more discretion in resentencing. Specifically, the court was concerned that considering any additional factors would “put defendants convicted of crack cocaine offenses in a far better position than defendants convicted of other drug offenses.”²⁰³ The court concluded that “[t]here is no indication . . . that Congress intended this limited class of crack cocaine offenders to enjoy such a windfall.”²⁰⁴ Paradoxically, the Court was also concerned that the discretion to resentence defendants like an initial plenary sentencing would allow district courts to *increase* sentences, which would conflict with the language in section 404(b) providing that district courts may only impose *reduced* sentences.²⁰⁵ Therefore, the Ninth Circuit reasoned that less discretion for the district court was not only a better interpretation of the language and purpose of section 404(b), but also more judicially “straightforward.”²⁰⁶

Similarly, in *United States v. Batiste*,²⁰⁷ the Fifth Circuit held that the district courts had limited discretion when considering a motion under section 404(b).²⁰⁸ The court likened section 404(b) of the First Step Act to the limited sentencing modification procedure found in § 3582(c)(2), rather than an initial plenary sentencing, because the court determined that section 404(b) requires district courts to assess only a single variable—the updated penalties in § 841.²⁰⁹ Moreover, although the court *permitted* the district courts to consider other

202. *Kelley*, 962 F.3d at 477–78 (also rejecting that § 3582(c)(1)(B) applied to section 404(b)). Under § 3582(c)(2), a district court has limited discretion to provide relief within the narrow scope of the updated Guidelines range, applying only the updated Guidelines when considering whether to reduce the sentence. *Dillon v. United States*, 560 U.S. 817, 827–28 (2010). The district court may consider the § 3553(a) sentencing factors only if the underlying Sentencing Commission policy requires their application. *Id.* at 827.

203. *Kelly*, 962 F.3d at 478.

204. *Id.*

205. *See id.* (“If the court were bound to engage in a plenary reconsideration . . . it is possible that the defendant would be subject to a higher Guidelines range.”); § 404(b), 132 Stat. at 5222.

206. *Kelley*, 962 F.3d at 478.

207. 980 F.3d 466 (5th Cir. 2020).

208. *Id.* at 471 (citing *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019)).

209. *Id.* at 472.

factors, it did not *require* them to do so.²¹⁰ Therefore, since the obligatory procedural requirements were like sentencing modifications under § 3582(c)(2), the Fifth Circuit held that the reasonableness standard of review on appeal was inapplicable and that the appropriate standard was to review for an abuse of discretion.²¹¹

This Comment disagrees with the interpretation and analysis in *Batiste* and *Kelley* and reaches a different conclusion on the interplay between section 404(b) and § 3582(c), as well as the text and purpose of the First Step Act. Below, this Comment agrees with and supports the holdings of the Fourth, Sixth, and D.C. Circuits in *Collington*, *Foreman*, and *White*, which conclude that section 404(b) provides broad discretion to district courts similar to an initial plenary sentencing that must, therefore, be reviewed for reasonableness.²¹²

II. ANALYSIS

Appellate courts should review appeals of motions for resentencing under section 404(b) of the First Step Act for reasonableness.²¹³ However, circuit courts are split on which standard is appropriate—reasonableness or a more deferential abuse-of-discretion standard.²¹⁴ This disagreement centers around two main issues: (1) the interplay between section 404 and the sentencing modifications in 18 U.S.C. § 3582,²¹⁵ and (2) the authority provided by the text and legislative intent of the First Step Act.²¹⁶

210. *See id.* at 473–74 (rejecting that the district courts are obligated to consider post-sentencing conduct and § 3553(a) factors).

211. *Id.* at 479–80.

212. *See infra* Section II.

213. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222.

214. *See* Pazanowski, *supra* note 29 (reporting the Circuit split following *Collington*).

215. *Compare* United States v. Collington, 995 F.3d 347, 353, 360–61 (4th Cir. 2021) (citing United States v. Chambers, 956 F.3d 667, 671 (4th Cir. 2020)) (applying 18 U.S.C. § 3582(c)(1)(B) to section 404(b) of the First Step Act and reviewing for reasonableness), *with* *Batiste*, 980 F.3d at 479–80 (applying § 3582(c)(2) to the First Step Act and reviewing for abuse of discretion).

216. *Compare* United States v. White, 984 F.3d 76, 91 (D.C. Cir. 2020) (“Nothing less [than reasonableness] is sufficient to meet the goals of the Fair Sentencing Act and the First Step Act to provide a remedy for defendants who bore the brunt of a racially disparate sentencing scheme.”), *with* United States v. Kelley, 962 F.3d 470, 478 (9th Cir. 2020) (holding that Congress did not intend to benefit crack cocaine offenders by requiring district courts to undergo certain procedures and consider additional factors in resentencing).

A court's determination of which sentencing modification under § 3582(c) applies to section 404(b) prescribes the scope of the district court's discretion, which then dictates the standard of review that appellate courts must use to review the district court's decision.²¹⁷ Specifically, the applicable modification determines the procedures that a district court may (or must, depending on the circuit) include as part of its review.²¹⁸ Section II.A argues that the abuse-of-discretion circuits incorrectly apply the sentencing modification in § 3582(c)(2) to section 404(b) because the language of section 404(b) is not limited like § 3582(c)(2).²¹⁹ Rather, the sentencing modification in § 3582(c)(1)(B) better comports with section 404(b) because § 3582(c)(1)(B) directs the district court to interpret the text and intent of the underlying statute providing the opportunity for sentencing relief.²²⁰

Turning to the legislative intent of the First Step Act, Congress's purpose was to provide a sweeping remedy to defendants sentenced under laws that disparately penalized offenses involving crack cocaine compared to powder cocaine.²²¹ This purpose demands broad district court discretion in resentencing those defendants, similar to that of an initial plenary sentencing.²²² Consequently, like initial plenary sentencings, motions for resentencing under section 404(b) of the First Step Act must be reviewed for reasonableness on appeal.²²³

217. See *supra* Section I.A.3; *infra* Section II.A.

218. See *supra* Section I.A.3; *infra* Section II.A.

219. See *infra* Section II.A; *Batiste*, 980 F.3d at 479–80; *Kelley*, 962 F.3d at 477–78.

220. *Collington*, 995 F.3d at 354.

221. See *infra* Section II.B.

222. See *infra* Section II.B; see, e.g., *United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020) (requiring courts to consider many of the factors that are part of an initial plenary sentencing, such as the § 3553(a) factors and post-sentencing conduct, when considering motions under section 404(b)).

223. See *infra* Section II.B; *United States v. Booker*, 543 U.S. 220, 261 (2005). Importantly, Congress's intent provides a basis for reasonableness review even when a court does not *explicitly* apply § 3582(c)(1)(B) to section 404(b). See *White*, F.3d 76 at 90–91; *United States v. Foreman*, 958 F.3d 506, 513 (6th Cir. 2020). Both *White* and *Foreman* distinguished section 404(b) proceedings from the limited review permitted under § 3582(c)(2) but did not explicitly hold that § 3582(c)(1)(B) applied to section 404(b). *White*, 984 F.3d at 90–91; *Foreman*, 958 F.3d at 513.

A. *Section 404(b) and § 3582(c)*

Section 404 of the First Step Act affords district courts broad discretion to resentence eligible defendants under the Act.²²⁴ Section 404(b) provides for much more than merely a mechanical sentencing reduction like § 3582(c)(2).²²⁵ Rather, § 3582(c)(1)(B) applies to section 404(b) because section 404(b) grants district courts with expansive discretion to resentence defendants similar to an initial plenary sentencing.²²⁶

Section 3582(c)(2) does not apply to section 404(b) because the text of section 404(b) grants more discretion than the qualified language found in § 3582(c)(2).²²⁷ Sentencing modifications under § 3582(c)(2) permit district courts to merely “reduce” a sentence by considering a single factor—the updated Guidelines range that has been lowered by the U.S. Sentencing Commission.²²⁸ The district court may only consider § 3553(a) sentencing factors if permitted by the “applicable policy statements issued by the Sentencing Commission.”²²⁹ However, section 404(b) of the First Step Act directs courts to “*impose a reduced sentence as if* sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.”²³⁰ The abuse-of-discretion circuits interpret the “as if” language in section 404(b) to permit the district courts to consider only one changed variable—the updated penalties under § 841—when considering motions for resentencing under 404(b).²³¹ However, the text of section 404(b) includes the word “impose,” rather than merely “reduce,” which indicates that the district courts’ discretion to decide

224. See, e.g., *Collington*, 995 F.3d at 355.

225. See *id.* at 353 (quoting *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020)); *Dillon v. United States*, 560 U.S. 817, 826 (2010) (limiting discretion of district court under § 3582(c)(2)).

226. *Chambers*, 956 F.3d at 671 (holding that motions under section 404(b) are brought under § 3582(c)(1)(B)).

227. *Collington*, 995 F.3d at 353; see also *Dillon*, 560 U.S. at 826 (limiting discretion of district court under § 3582(c)(2)).

228. § 3582(c)(2).

229. *Id.*

230. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (emphasis added) (citation omitted).

231. *United States v. Kelley*, 962 F.3d 470, 475–76 (9th Cir. 2020); *United States v. Batiste*, 980 F.3d 466, 471 (5th Cir. 2020) (citing *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019)).

a motion under section 404(b) is more broad than § 3582(c)(2).²³² The use of “impose” permits the district courts to undergo a more thorough approach, and applying the updated penalties in § 841 is but one factor that the district court must consider when determining the new sentence. In other words, the “as if” language demands that district courts apply the adjusted penalties, but it does not limit the implementation of additional procedures or the consideration of additional factors or evidence.²³³ Therefore, given the conflict between section 404(b) and § 3582(c)(2), the proper sentencing modification statute to apply to the section 404(b) is the one found in § 3582(c)(1)(B).

The circuits that apply reasonableness review differ in their approach to applying § 3582(c)(1)(B). Specifically, the Fourth Circuit differs from the Sixth and D.C. Circuits by *explicitly* applying § 3582(c)(1)(B) to section 404(b).²³⁴ While the Sixth and D.C. Circuits distinguished section 404(b) from § 3582(c)(2), they did not expressly apply § 3582(c)(1)(B) to section 404(b).²³⁵ However, this omission created a distinction without a difference. Every modification to a final sentence must be rooted in one of the exceptions to finality provided by § 3582(c).²³⁶ Even though the Sixth and D.C. Circuits openly refused to apply § 3582(c)(2), they did not explicitly apply any other sentencing modification under § 3582(c) to section 404(b).²³⁷ Section 3582(c)(1)(B) permits the court to “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute,” which requires the court to interpret the underlying statute providing the sentencing modification as a next step.²³⁸ When the Fourth Circuit

232. *Collington*, 995 F.3d at 354 (citing *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020)).

233. *See* *United States v. Foreman*, 958 F.3d 506, 513 (6th Cir. 2020) (holding that section 404 authorizes district courts to apply the Fair Sentencing Act *and* “exercise its discretion to *impose* a new sentence” (emphasis added)).

234. *Collington*, 995 F.3d at 353 (reaffirming that § 3582(c)(1)(B) “implements” section 404(b)).

235. *See* *United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020); *Foreman*, 958 F.3d at 513.

236. *See* 18 U.S.C. § 3582(c) (stating that “[t]he court may not modify a term of imprisonment once it has been imposed except” under § 3582(c)(1)(A), § 3582(c)(1)(B), or § 3582(c)(2)).

237. *See* *White*, 984 F.3d at 90–91; *Foreman*, 958 F.3d at 513.

238. 18 U.S.C. § 3582(c)(1)(B); *see also* *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020) (“[When] applying § 3582(c)(1)(B), we look to the underlying statute to determine what it expressly provides.”).

explicitly applied § 3582(c)(1)(B), it properly grounded its decision in the modification statute before interpreting section 404(b), as required by § 3582(c)(1)(B).²³⁹ The Sixth and D.C. Circuits, however, refused to apply § 3582(c)(2) and immediately turned to interpret section 404(b) without explicitly applying § 3582(c)(1)(B).²⁴⁰ In doing so, the two courts *implicitly* applied § 3582(c)(1)(B) by interpreting section 404(b) and holding that district courts have broad discretion to resentence defendants.²⁴¹

Applying § 3582(c)(1)(B) rather than § 3582(c)(2) to section 404(b) significantly affects the standard of review used by the appellate court. Importantly, the reasonableness standard of review prescribed by *Booker* does not apply to appellate review of sentencing modifications under § 3582(c)(2).²⁴² In *Dillon*, the U.S. Supreme Court held that *Booker* did not apply to § 3582(c)(2) because district courts have limited discretion when considering motions under § 3582(c)(2), unlike the broad discretion they have when making initial plenary sentencing decisions.²⁴³ Therefore, it would be illogical for appellate courts to review district court decisions on motions under § 3582(c)(2), where district courts have limited discretion, with the same standard used to review initial plenary sentencings, where the district courts have broad discretion.²⁴⁴ For the reasons stated above, the Fourth, Sixth, and D.C. Circuits have reasoned that § 3582(c)(2) does not apply to section 404(b) and have, explicitly or implicitly, applied § 3582(c)(1)(B) to section 404(b).²⁴⁵ When applied, § 3582(c)(1)(B) requires courts to interpret the underlying statute providing the sentencing modification.²⁴⁶ Those same circuits interpret the text and legislative intent of section 404 of the First Step Act to provide broad discretion to the district court to undergo a

239. *Collington*, 995 F.3d at 353 (quoting *Chambers*, 956 F.3d at 671).

240. *See White*, 984 F.3d at 90–91; *Foreman*, 958 F.3d at 513.

241. *See White*, 984 F.3d at 90–91; *Foreman*, 958 F.3d at 513.

242. *Dillon v. United States*, 560 U.S. 817, 831 (2010).

243. *Id.* at 827–28.

244. *See, e.g., United States v. Kelley*, 962 F.3d 470, 479 (9th Cir. 2020) (“Given our conclusion that the First Step Act does not authorize plenary resentencing, the district court properly exercised its discretion.”).

245. *See supra* notes 234–41 and accompanying text.

246. *See* § 3582(c)(1)(B) (“[T]he court may modify an imposed term of imprisonment to the extent *otherwise expressly permitted by statute.*” (emphasis added)); *see also Collington*, 995 F.3d at 354 (“[Section] 3582(c)(1)(B) requires courts to ‘look to the underlying statute to determine what it expressly provides.’” (quoting *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020))).

process like that of an initial plenary sentencing.²⁴⁷ This discretion, therefore, requires the appellate court to review for reasonableness, the same standard used to review appeals of initial plenary sentencings.²⁴⁸

B. The Legislative Intent of the First Step Act and Its Implications for Judicial Review

After applying the sentencing modification in 18 U.S.C. § 3582(c)(1)(B) to section 404(b) of the First Step Act, courts must interpret the text and legislative purpose of section 404(b).²⁴⁹ In this analysis, section 404(b) requires reasonableness review of resentencing motions on appeal.

Congress was motivated to remedy the unfairly disparate sentencing scheme under 21 U.S.C. § 841 that more harshly penalized conduct involving crack cocaine than powder cocaine by a ratio of 100:1.²⁵⁰ With sections 2 and 3 of the Fair Sentencing Act and section 404(b) of the First Step Act, Congress afforded broad discretion to the district court to reduce these sentencing disparities.²⁵¹ Therefore, the district court's sweeping discretion to resentence defendants that were unfairly punished under this sentencing scheme must be reviewed with the same standard that appellate courts use to review initial plenary sentencing decisions—procedural and substantive reasonableness.²⁵²

Congress took action to reduce the sentencing disparities because it thought those disparities were unreasonable.²⁵³ The congressional

247. See, e.g., *Collington*, 995 F.3d at 358 (citing *Chambers*, 956 F.3d at 671–75) (“[T]he district court may only exercise its discretion to reduce or not reduce any given sentence after faithfully considering a number of resentencing factors.”).

248. See *id.* (applying reasonableness review because of the district court's broad discretion to consider sentencing factors).

249. *Id.* at 354.

250. Compare 21 U.S.C. § 841(b)(1)(B)(iii) (2006) (penalizing crimes involving 5 grams of crack cocaine), with § 841(b)(1)(B)(ii) (penalizing crimes involving 500 grams of powder cocaine); see *supra* notes 138–43 and accompanying text.

251. See *United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020) (describing the First Step Act and the Fair Sentencing Act as “strong remedial statutes” that seek to remedy “disproportionate and racially disparate sentencing penalties”).

252. See, e.g., *Gall v. United States*, 552 U.S. 38, 51 (2007) (“Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence . . .”).

253. See 164 CONG. REC. S7,649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley) (“The First Step Act . . . addresses overly harsh and expensive mandatory

record reveals bipartisan concern regarding the prescribed sentences under § 841, evoking one of the § 3553(a) sentencing factors that district courts are required to consider when imposing a sentence.²⁵⁴ The sixth factor listed in § 3553(a) requires courts to “consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”²⁵⁵ Through section 404(b) of the First Step Act, Congress acted for that precise reason—to provide relief to the defendants who were not eligible for the updated sentences that reduced the disparity between the “similar conduct” of violating the law with crack cocaine instead of powder cocaine.²⁵⁶

The Ninth Circuit simply gets it wrong when it states that Congress did not intend to provide relief to the “limited class of crack cocaine offenders,” as well as when it characterizes the availability of resentencing as a “windfall.”²⁵⁷ Congress explicitly intended to provide relief to this particular group of defendants imprisoned under an unfair sentencing scheme.²⁵⁸ The text of section 404(b) and the congressional record identified that those sentenced for crack cocaine offenses under § 841 or § 960 before the passage of the Fair Sentencing Act were sentenced unfairly, and Congress acted to provide relief to that specific beneficiary.²⁵⁹

The Ninth Circuit also reasoned a logical fallacy when it limited the district court’s discretion under section 404(b) in part because broad discretion to resentence those convicted of crack cocaine offenses would put them “in a far better position than defendants convicted of

minimums for certain nonviolent offenders.”); *id.* at S7021 (statement of Sen. Dick Durbin) (“[The First Step Act] give[s] a chance to thousands of people who are still serving sentences for nonviolent offenses involving crack cocaine under the old 100-to-1 ruling”); *id.* at S7,747–48 (statement of Sen. Amy Klobuchar) (“[The First Step Act] includes a crucial provision to allow people who were sentenced under discriminatory drug laws, which required a longer mandatory minimum sentence for the possession of crack than for the possession of the same amount of cocaine, to petition to be resentenced under the reform guidelines we passed in 2010.”).

254. 18 U.S.C. § 3553(a)(6).

255. *Id.*

256. *See id.*; *United States v. Collington*, 995 F.3d 347, 354–55 (4th Cir. 2021) (“[T]he First Step Act was motivated by a belief that individuals prior to 2010 were sentenced under an unduly harsh sentencing scheme.”).

257. *United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020).

258. *See supra* note 253.

259. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010) (“Cocaine Sentencing Disparity Reduction”); *supra* note 253.

other drug offenses.”²⁶⁰ Although disparities in sentencing may well exist for other drug offenses, that fact does not mean that this class of offenders should not benefit from targeted relief simply because others do not benefit. Furthermore, to reach such a conclusion, the court ignored the sentencing disparities that unduly punished conduct involving crack cocaine by a 100:1 margin compared to powder cocaine.²⁶¹ The disparity remains, albeit reduced by the reforms found in the Fair Sentencing Act and First Step Act, at 18:1.²⁶² Therefore, even with the so-called “windfall” of these reforms, crimes involving crack cocaine are still disproportionately punished.

In passing the First Step Act, Congress enacted a “strong remedial statute[]” to rectify these penalties, granting district courts broad discretion to “fashion the most complete relief possible” when resentencing defendants under section 404(b).²⁶³ The district court’s discretion under section 404(b) is similar to an initial plenary sentencing, which appeals courts review under a reasonableness standard.²⁶⁴ Therefore, reasonableness review is the appropriate standard of review to apply to appeals of motions under section 404(b). The similarity between the district court’s discretion in an initial plenary sentencing and when considering motions under section 404(b), which permits the district court to “fashion the most complete relief possible” when resentencing defendants,²⁶⁵ demands a probing review for reasonableness by appellate courts.

260. *Kelley*, 962 F.3d at 478.

261. Compare 21 U.S.C. § 841(b)(1)(B)(iii) (2006) (penalizing crimes involving 5 grams of crack cocaine), and *id.* § 960(b)(2)(C) (penalizing crimes involving the import or export of 5 grams of crack cocaine), with § 841(b)(1)(B)(ii) (penalizing crimes involving 500 grams of powder cocaine), and § 960(b)(2)(B) (penalizing crimes involving the import or export of 500 grams of powder cocaine).

262. ZIBULSKY & KITCHENS, *supra* note 146, at 41. However, the 117th Congress has proposed legislation to reduce the disparity from 18:1 to 1:1—entirely eliminating the sentencing disparity between crack and powder cocaine—through the EQUAL Act of 2021. H.R. 1693, 117th Cong. (2021); S. 79, 117th Cong. (2021); see also *supra* note 158.

263. *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020).

264. *United States v. Booker*, 543 U.S. 220, 261, 264–65 (2005). The Court required “appellate courts to determine whether the sentence ‘is unreasonable’ with regard to § 3553(a),” among other procedural and substantive requirements. *Id.* at 261; see *supra* Section I.A.2.

265. *White*, 984 F.3d at 90.

CONCLUSION

With the First Step Act, Congress sought to right a decades-old wrong by retroactively reducing the disparity between penalties for offenses involving crack cocaine compared to offenses involving powder cocaine. Congress first acknowledged this disparity, which disproportionately affects Black defendants, when they passed the Fair Sentencing Act of 2010. However, the cocaine sentencing disparity reduction implemented by the Fair Sentencing Act did not apply to those already sentenced under this unfair sentencing scheme. It took another eight years for Congress to finally provide relief to individuals like Chuck Collington through the First Step Act. At that point, in 2018, most of the 2,600 defendants eligible for relief had been in prison for at least a decade. To remedy these unfairly harsh sentences, Congress provided the district courts with broad discretion, not unlike an initial plenary sentencing, to resentence these defendants under section 404(b) of the First Step Act. Since initial plenary sentencing decisions are reviewed for substantive and procedural reasonableness, appeals of decisions on motions under section 404(b) must also be reviewed for reasonableness. Nothing less can be required to ensure that district courts, with their broad discretion, provided these defendants with the opportunity for the relief that Congress intended.

The reasonableness review standard was developed to give district courts discretion in sentencing, but with a check so that federal courts across the country could have some chance at uniformity without mandating Guidelines sentences. The same principles apply to resentencings under section 404(b)—procedural and substantive reasonableness are a necessary guardrail that prevents the broad discretion of the district courts from slipping off the road. However, with the circuits split on this issue, the scope of relief available under section 404(b) is not uniform, and the defendants that have been unfairly sentenced are subject to yet another disparity.